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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1304
74-1107

FRANCIS LEO CAPPAERT, MARILYN I. CAPPAERT, et al.,
Petitioners,

vs.

UNITED STATES OF AMERICA

STATE OF NEVADA ex rel. ROLAND D. WESTERGARD,
STATE ENGINEER, *Intervenor.*

Amicus Curiae Brief in Support of Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

STATE OF ARIZONA
BRUCE BABBIT
Attorney General
Capitol Building
Phoenix, Arizona

ARIZONA WATER COMMISSION
RALPH E. HUNSAKER
Chief Counsel
3003 North Central Avenue
1800 First Federal Savings Bldg.
Phoenix, Arizona 85012

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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I.

INTERESTS OF AMICUS

Arizona, named herein as *Amicus curiae* has, as do all arid western states a system for the administration and determination of water rights. Due in significant part to the security afforded by water rights granted under these systems the arid West has been transformed into an eco-

nomically productive and socially inhabitable region. R. J. Moses Federal-State Water Problems 47 Denver LJ 194, (1970). For example, Arizona's population has almost tripled during the past two decades, principally in the urban areas. Meeting the water demands of the growing population and continuing to sustain the existing irrigated agricultural economy has necessarily resulted in increased pumping from an already overdrafted ground water supply. Arizona's ground water supply is vital to the economy and growth of the state. Indeed, the City of Tucson, population of over 262,000 has no source of water other than ground water. Only 334 square miles of Arizona's almost 114,000 square miles, are water surface. Arizona Interstate Stream Commission, Water Resources, Report (October 1967). Consequently, Arizona's ground water is vital to the state's existence. The annual demand and use of such ground water far exceeds the annual recharge or replenishment. (See Exhibit 1 of Appendix)

It has become apparent in recent years because of the overdraft of ground water that thousands of acres of irrigable land have been forever barred from the cultivation of crops. An overdraft of the state's ground water supply nevertheless continues at an average rate of 2.2 million acre feet per year. Each year more acres of farm land are taken out of cultivation, partly because of declining water levels and because cities such as Tucson, and other users, must retire agricultural uses to sustain current pumping levels for critical domestic and municipal needs.

Privately owned land in Arizona comprises only 16% of the state as opposed to 72% owned by the Federal Government. (See Exhibit 2 in the Appendix). If it were judicially determined by this court that every withdrawal of federal land from the public domain carried with it an implied reservation of sufficient surface water *and ground*

water to satisfy every potentially beneficial use which might thereafter be made of the land, then essentially all water now used on non-federal land in Arizona has been so reserved. If the Federal Government is entitled to exploit water so reserved by implication, Arizona, as presently known, would cease to exist.

If it were held that ground water pumping on non-federal lands must be limited to cause no decline in water levels underlying federal lands then it would be impossible for ground water pumping to continue in the State of Arizona. Nearly all federal reservations in Arizona were created or designated prior to any significant use of pumps. Consequently, almost all rights in ground water in Arizona would be wiped out. The importance of *United States v. Cappaert* is inestimable for the people of Arizona and the arid West. The implications of this decision reach far beyond its factual setting. For example, presently pending in the Federal District Court for Arizona is *United States v. City of Tucson*, Cause No. CIV 75-39 filed February 20, 1975. There the United States on behalf of the San Xavier Papago Reservation claims all surface and ground water rights in the 3,500 square mile Santa Cruz River Basin. (This litigation was based upon, and filed shortly after the decision of the Ninth Circuit court in this matter.) This expanse includes vast acreage of privately owned land stretching from Mexico to Central Arizona. In addition, the United States seeks to enjoin ground water pumping which causes water level decline on the reservation. If such relief were granted the City of Tucson, which has no source of water other than ground water, would cease to exist as would other economic interests in the Basin. Thousands of people in the Santa Cruz Basin would have no source of water and hundreds and thousands of acres of farm land would revert to desert.

This court in *Winter v. United States*, 207 U.S. 564 (1908) and *Arizona v. California*, 373 U.S. 546 (1963), found by implication that the Federal Government had reserved certain amounts of water from stream flow, surface water, at the time the lands were withdrawn from the public domain. These cases did not consider applying the reservation doctrine to underground water supplies. For the lower court to imply that the reservation doctrine applies to underground water, as indicated above would be catastrophic for the State of Arizona and other western states. The far reaching effect of the Ninth Circuit decision merits this Court's consideration. The *Amicus* thus feels compelled to advise this Court of its position in favor of the State of Nevada's Petition for Writ of Certiorari to review the Ninth Circuit decision.

II.
QUESTIONS PRESENTED

This brief is confined to the following issues which Amicus considers to be the most crucial to its interests:

(1) Whether Congress intended under the Act for the Preservation of American Antiquities to vest the President with authority to reserve water for the purpose of protecting an endangered species.

(2) Whether the "reservation doctrine" applies to percolating ground water underlying land adjacent to reserve lands so as to preclude the landowner from pumping water from beneath his land pursuant to his state granted water rights.

(3) Whether the federal government should be barred under the principles of *res judicata* from seeking to adjudicate in a subsequent judicial action issues decided in an

administrative proceeding in which it participated to determine a water rights application before the state engineer from whose order the government failed to appeal.

III.
ARGUMENT

A. Assuming, arguendo, that he intended to do so, President Truman did not have authority under the Act for the Preservation of American Antiquities to reserve waters on lands withdrawn pursuant to the Act for the purpose of protecting an endangered species of desert pupfish.

The scope of the implied reservation doctrine remains undefined leaving many questions unresolved, C. Wheatly & C. Coker, *Study of the Development, Management and Use of Water Resources on Public Land*, 136 (1969). For example one unresolved question is the detailed nature of the showing required to establish an implied intent to reserve waters upon the creation of a reservation. Counsel for the United States in its brief before the lower court advanced the following proposition:

> "In all cases, the test to be applied to determine the existence of federal reserved water rights is whether the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created."

The government asserts that the mere act of withdrawal automatically results in the reservation of unappropriated waters for the purposes of the reservation. As indicated previously such a broad and sweeping reservation would be disastrous for the state of Arizona.

However, it is submitted that the government's test is improper. Rather, an analysis of the statutory authority for each withdrawal must be made in order to determine the government's reserved rights claims. Such an analysis

would be in accord with the landmark case of *Winters v. United States, supra,* which created the reservation doctrine.

The application of the reservation doctrine is dependent on the assumption that the government intended to reserve *unappropriated water* for the reserved land. Thus, in *Winters v. United States,* this Court ruled that Congress must have intended to reserve rights to water for lands that it set aside by treaty for an Indian reservation, even though it did not expressly provide for them. This intention to reserve water was implied on the basis that it would be unconscionable for the United States to have induced Indians onto a reservation, where they were to settle and develop an agricultural economy without supplying them an adequate supply of water for agricultural and related purposes. However, the special circumstances that may justify an implication of intent to reserve water for the Indians—treaties attempting to convert the Indians from a nomadic to a pastoral life, the doctrine that agreements with Indians are to be construed in favor of the Indians, in acquiring the water and putting it to beneficial use—are not present with respect to other federal establishments. Note, *Water in the Woods: The Reserved Rights Doctrine and National Forest Lands,* 20 Stan. L. Rev. 1187 (1968). A significantly greater showing of an intention to reserve waters for non-Indian lands as opposed to Indian Lands should therefore be required. If this intention is not expressed in the legislation or order authorizing the withdrawal, or if it is not clearly implied from the authorization, then the government should not be deemed to have reserved rights. An analysis of the Act for the Preservation of American Antiquities containing Devil's Hole, and the Act's

statutory background and subsequent executive interpretation clearly discloses that the President had no authority to reserve waters thereunder for purpose of protecting an endangered species of desert pupfish, and that the lower court erred in concluding otherwise.

The Act for the Preservation of American Antiquities passed in 1906 vested the President of the United States with authority to "declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest . . ." and to reserve parcels of land as national monuments "the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected." 34 Stat. 255, 16 U.S.C. S 431-33. There is no evidence whatsoever in the language of the Act to intimate that the President was vested with authority to reserve water as distinct from "parcels of land." Furthermore, the purpose of the Act was to preserve American antiquities of historic and scientific interest. There is absolutely no indication that the Congress intended to vest the executive with authority to make reservations under the Act for the purpose of conservation of wildlife.

The Ninth Circuit accepted the government's argument that Section I of the National Park Service Act of 1916 supports the conclusion that a fundamental purpose of national monuments is to preserve wildlife. The National Park Service Act established the National Park Service to promote and regulate the use of national parks and monuments "by such means and measures as conform to the fundamental purpose of said parks, monuments and reservations, which purpose is to conserve the scenery and the natural and historic objects and wildlife therein and to

provide for the enjoyment of the same by such manner and such means as will leave them unimpaired for the enjoyment of future generations." 39 Stat. 535, 16 U.S.C. S 1.

It is submitted that this language is of little or no relevance in determining the purposes of the 1906 Act in question. It is a general provision establishing a new agency with duties that would include the operation of national parks, national monuments, and national areas, each having a distinct public purpose warranting protection. The language set forth above was merely a summary of these separate purposes. Moreover, whatever the purpose of national monuments, there is no evidence in the National Parks Service Act to support the government's contention as to the basic issue in this case; whether the President was authorized under the Act for the Preservation of American Antiquities to reserve water as distinct from land for the purpose of protecting an endangered species.

The National Parks Service, which has jurisdiction over Death Valley National Monument and therefore Devil's Hole has until now followed the policy that the Parks Service should strictly adhere to state law with respect to the establishment and maintenance of water rights for use on lands under their jurisdiction. C. Wheatley & C. Corker, *Study of the Development, Management, and Use of Water Resources on the Public Lands* 310 (1969). Thus, the following statements were contained in a proposed chapter for a Parks Service handbook:

> "It is particularly important [for Superintendents] to check with the State Engineer, State Water Board or other proper state authority to determine whether a license or permit is required before a well is started." National Park Service, Resources Management Handbook, proposed Ch. 8, S 3 at 4 (Sept. 1967).

Not only does the proposed chapter on water rights for the Park Service handbook emphasize the importance of compliance with state law, but more importantly no reference is ever made to the reservation doctrine or its potential effect upon water rights acquired under state law. C. Wheatley & C. Corker, *Study of the Development, Management and Use of Water Resources on the Public Lands* 311 (1969).

Language of a Congressional act of 1946 also clearly demonstrates that Congress as well contemplated that water rights on Park Service lands were to be acquired by the Service pursuant to state law. It provides as follows:

> Appropriations for the National Parks Service are authorized for—
>
> *(G) Investigation and establishment of water rights in accordance with local custom, laws, and decisions of courts* the acquisition of water rights or of lands or of interest lands or rights-of-way for use and protection of water necessary or beneficial in the administration and purpose of the national parks and monuments. Act of Aug. Ch. 788, 60 Stat. 885 (emphasis added).

Note that there is no mention, or even inference, in the statutes that acquiring water rights pursuant to state law was being done as a comity on the theory that the withdrawal of the lands reserved water not then validly appropriated.

In conclusion, assuming, *arguendo,* that the President intended by the Presidential Proclamation of 1952 to reserve water as well as land for the preservation of an endangered species of pupfish, it is clear that he had no authority to do so under the Act for the Preservation of American Antiquities upon which he relied, or any subse-

quent Congressional act or authorization. The lower court's erroneous conclusion to the contrary presents not only an ominous threat to state granted water rights in waters on or adjacent to the vast national monuments in the West, but also to waters on or adjacent to other reservations where it is likewise evident that Congress did not intend to reserve water for reservation purposes as distinct from land. The Amicus therefore urges this court to review the Ninth Circuit's decision.

B. The "reservation doctrine" should not be extended to apply to percolating ground water underlying land adjacent to reserved lands so as to enjoin the landowner from pumping water from beneath his land pursuant to state granted rights.

1. Overview of facts and law relating to percolating water in Arizona.

To understand the precise nature of the water rights at issue and the effect of the federal government's alleged right to "reserve" percolating ground water regardless of its effect upon state vested water rights it is important to have an overview of Arizona water law.

Subsurface waters are usually categorized as either "underground streams" or "percolating waters." The difference is that an "underground stream" is a definite and defined body or channel of water coming from a known source, whereas "percolating water" consists of excess water from irrigation or rain oozing through the soil from undefined and unknown channels. *Brewster v. Salt River Valley Water Users Assn.*, 27 Ariz. 23, 229 Pac. 929 (1924). A critical identifying characteristic of percolating water is that it is not discoverable from surface indications without excavation. Clark, *Waters and Water Rights,* Vol. 1, p. 326 (1967). The difficulty in ascertaining the source of the water as well as its continuing avenues and channels

sets it apart from well-defined channels of water in terms of formulating a practical and desirable scheme to adjudicate rights therein.

Surface water and underground water which run in definable channels are, under Arizona law, subject to "prior appropriation." However, percolating water is not. See *Maricopa County v. SouthWest Cotton Co.,* 39 Ariz. 65, 2P.2d 369 (1931) and *Bristor v. Cheatham,* 73 Ariz. 228, 240 P.2d 185 (1952), rev'd 75 Ariz. 227, 255 P.2d 173 (1953). In *Bristor v. Cheatham, supra,* the Arizona Supreme Court in a controversial decision squarely faced the question whether percolating water would be subject to the doctrine of prior appropriation. The court ultimately held that the doctrine of prior appropriation was not and never had been the law in Arizona with respect to percolating water and that such a doctrine was not well suited to conditions in the arid Southwest. The court concluded that the Desert Land Act of March 3, 1877 and the subsequent interpretation of the act by this Court in *California-Oregon Power Co. v. Beaver Portland Cement Co.,* 295 U.S. 142 (1935) did not necessarily require that percolating water be subject to the doctrine of prior appropriation. The court pointed out that under both the civil and common law the ground water belonged to the owner of the soil. More importantly, the court stated that the Arizona legislature in 1864 provided a statutory scheme for the appropriation of water in well defined channels whether they be surface or subsurface but provided no such scheme for percolating water. The Arizona Supreme Court relied upon *California-Oregon Power Co. v. Beaver Portland Cement Co., supra,* to reason that since the states were given the unalterable right to devise and implement a statutory scheme for the adjudication of ground water

rights, the legislature could determine which waters are public and subject to appropriation and which are not.

The court went on to hold that the "reasonable use" doctrine would apply to percolating water to the effect that the "owner of lands overlying ground waters may freely, without liability to an adjoining user, use the same without limitation and without liabilities to another owner, providing his use thereof is for the purpose of reasonably putting the land from which the water is taken to beneficial use" (p. 178).

Subsequent to the above decision, the legislature of Arizona created a comprehensive legislative scheme to adjudicate and determine the landowner's rights to drill for percolating water in areas where the water level was so critically low that a modification of the "reasonable use" doctrine was necessary. A state agency was given the power to designate some basins as "critical ground water" areas, and prohibit new drilling therein, with limited exceptions. Arizona Revised Statutes, § 45-301 et. seq., regulating the use of such waters, although considered a part of the landowner's property, was upheld as a proper exercise of the police power of the state, *Southwest Engineering Co. v. Ernst,* 79 Ariz. 403, 291 P.2d 764 (1955). For an excellent and thorough discussion of the history of Arizona water law as well as the adoption of the abovementioned code to regulate ground water, see Mann, *Law and Politics of Ground Water in Arizona,* 2 Arizona L. Rev. 241 (1960).

In brief, after tumultuous controversy over the years, both the legislature and the court of Arizona resolved the question as to what theory of law should apply to percolating water in favor of the "reasonable use" doctrine. The policy underlying this resolution is that the needs of arid Arizona are best met by that doctrine where the landowner

is able to use the water underneath his land without limitations so long as it is put to a reasonable use.

2. This court has not previously applied the reservation doctrine to percolating water.

This Court has never considered whether the reservation doctrine should apply to percolating water. See, *Winters v. United States, supra* and *Arizona v. California, supra.* These decisions deal only with appropriable surface waters. Likewise, the two cases relied upon by the Ninth Circuit, *State ex rel Shamberger v. United States,* 165 F. Supp. 600 (D.Nev. 1958), affirmed on other grounds 279 F.2d 699 (9th Cir. 1960), and *Tweedy v. Texas Co.,* 286 F.Supp. 383 are not binding upon this Court and indeed, were not firm precedent for the lower court's holding. In fact, these cases shed little light on the problem presented because they do not involve an adjacent landowner and his right to pump water pursuant to state law.

There is no logical basis to apply the reservation doctrine to percolating groundwaters when the effect is to destroy property rights to water which have been recognized for years.

3. The reservation doctrine is incompatible with the nature of ground water, particularly in Arizona where such water is not appropriable.

There simply is no basis for the assertion that the federal government via Congress impliedly reserved or will reserve in perpetuity all percolating water underlying land adjacent to the reserved land so as to preclude the landowner from drilling on his own land. The following discussion will point out the legal deficiencies in such an assertion as well as the practical barriers to any reasonable man concluding that Congress so intended.

First, the Desert Land Act should be interpreted as follows: Whereas the courts have held that the Desert

Land Act does not apply to reserved federal property insofar as well-defined surface waters or subsurface water directly underlying the federal land are concerned, the Desert Land Act remains viable in terms of giving states the absolute right to develop statutory or case law with respect to percolating water, especially where that water is not only unappropriated but unappropriable because of its nature. Were this not true, the Act would be a sham because there would be virtually no unappropriated water in the West which the states may conclusively control or define the rights therein. This is because all water is either appropriable water in well-defined channels and most of the latter lies near or adjacent to some federal reserved land in the state of Arizona.

Arizona courts have interpreted the Act to mean that the states would be allowed to pass laws respecting the adjudication of water rights but that it did not require that the doctrine of prior appropriation be applied. This conclusion was supported by this Court's interpretation in *California-Oregon Power Co. v. Beaver Portland Cement Co., supra,* wherein it stated that the Act allows the states to conclude that the waters are public and subject to appropriation and regulation, but "does not bind or purport to bind the states to any policy" (p. 164). Thus, neither the Act nor the decision disturbed the more basic and traditional concept of Arizona law that percolating water belongs to the overlying landowner.

To interpret the Act otherwise would not only be tantamount to erasing from the statutes as well as from the case books, all regulations, and pronouncements with respect to the reasonable use doctrine as heretofore applied in Arizona, as well as in other states where federal conflicts arise, but it would fail to recognize the crucial difference between appropriable well-defined channels of water

and percolating water. The basic concept underlying the reasonable use doctrine as applied to percolating water is that the overlying landowner has an unqualified right to pump water on his land so long as he puts it to reasonable use. This concept is necessitated by the fact that water is scarce and that it is impossible to trace the original source and channel of percolating water so as to apply rules of priority, notice, and the like. Whereas surface water moves rapidly over the stream bed and any interference thereto can affect the downstream user in a short period of time, the pumping of percolating water may not affect the water level on adjacent lands for years and even then possibly imperceptibly.

Thus, where percolating water is concerned, the argument of reserved federal rights does not apply because the doctrine is inherently coupled with the concept of appropriation where the date of first use, notice and priority are fundamental aspects. This Court in *Arizona v. California, supra,* made clear that where water is in a well-defined stream, should a private appropriator's rights vest prior to the setting aside of the federal land, there can be no reservation of superior right. But as to all subsequent appropriations by private landowners, the federal rights are superior even to the extent that the federal use increases without compensation paid to the landowner over the years or completely divests the subsequent appropriator of any rights to the water. Obviously this principle or concept as to the date of private appropriations vis-a-vis date of reservation is not compatible with percolating water, where a state such as Arizona utilizes the "reasonable use" doctrine.

Consider first the situation where a landowner begins pumping water on his land and does so without legal restriction so long as he puts it to reasonable use. Many

years thereafter the federal government reserves adjacent land and asserts that the private landowner must cease pumping because it affects the water level beneath the federal land. The landowner's initial use of the water originated long before the reservation was set aside, yet, because of the slow and untraceable moving of the water the effect of the use does not appear for years. It would be absurd to argue that since the creation of the reservation occurred before the manifestation of the adjacent landowner's use (and prior to the correlating assertion of a federal right) the federal rights are superior.

Consider the second situation where the landowner acquires his land and begins pumping ground water subsequent to the reservation date. His rights to the percolating water underneath his land are now uncertain because his right to continue pumping is always susceptible to divestment by any later assertion by the federal government of its so-called reserved rights. This landowner has never been placed on notice, prior to the decision in *Cappaert v. United States,* that he may be divested of his water rights without compensation. Indeed, the overlying owner may never have had any indication that his use of percolating water affected the federal land.

In short, in a state such as Arizona where certain waters are unappropriable, i.e., no requirement of prior use or governmental approval of use, it is impossible to take the date of reservation and determine who had prior "vested" appropriation rights. The only circumstance where the state statutorily regulates and approves the use of percolating water is where "critical ground water" areas are involved. And even there, if the reservation doctrine were applied, this statutory scheme would become worthless because any determination by the state land department that an applicant may or may not commence new pumping

within those areas would have little effect should the federal government later assert its use of the ground water which is reserved. It is respectfully submitted that neither the Desert Land Act nor this Court's decisions can be interpreted to mean that Congress impliedly reserved all unascertained and unknown percolating water to the derogation and distraction of state law.

Second, sheer practical considerations and factors remonstrate against the government's argument. It is not reasonable to speculate that Congress intended to extend the scope of the doctrine so far. The facts presented in the previous section respecting the water problem in Arizona (intended as an example of such problems found in the various western states), demonstrate the crucial need for effective and consistent legal theories with respect to percolating water. They compel the conclusion that because of the immense acreage of federally owned lands in states, such as Arizona, the potential disruption of state laws and statutory schemes is tremendous should the lower decision stand.

Likewise, the effect on private property owners and municipalities is catastrophic. Over 72% of the land in Arizona is federally owned and reserved. This acreage is comprised of Indian reservations, national forests, national parks and monuments, as well as other types of federal enclaves. Nearly all of the ground water basins over laid by privatley owned land are adjacent to some type of federally reserved land. Hence, an extension of the reservation doctrine to percolating water underlying these lands would permit the federal government to claim superior rights to all such water regardless of the reasonable use to which it is put by the overlying landowner. This would wreak economic havoc upon the State and its citizens. Knowledge of this tremendous impediment

would stifle and possibly preclude future growth and development of the State. Existing rights and past investments worth millions of dollars would be rendered worthless. Cities such as Tucson, which depend upon groundwater, would become ghost towns.

Thus, to engulf already scarce water and the concomitant state-vested rights with the uncertainty of potential, but undefined and unasserted federal rights would be disastrous. Congress never intended this when it passed the Land Act nor when it reserved federal lands. Therefore, this Court should grant the Petition for Writ of Certiorari and review this extension of the reservation doctrine.

C. The United States is barred under the principles of collateral estoppel from initiating a court-action to adjudicate issues decided in a prior state administrative proceeding in which it participated, but from which it failed to appeal.

This Court in *United States v. District Court of Eagle County,* 401 U.S. 520 (1971), established that federally reserved water right claims may be adjudicated within the framework of state schemes. The United States cannot reasonably contend that the state did not have jurisdiction in the prior administrative proceeding by raising the doctrine of sovereign immunity since that doctrine is simply not applicable to the facts of this case. The doctrine provides that the government cannot be sued in its own courts, or in any other, without its consent. Here, the government was not sued, but instead intervened in the proceeding of its own volition to present its case against granting the defendant's application. Thus, the Nevada State Engineer in the administrative proceeding was competent to render a decision binding on all parties as to all matters affecting the defendant's application including the question of a conflicting federally reserved right.

Issues that were or could have been adjudicated in an administrative proceeding have been held barred from being litigated in a subsequent court action, especially where, as here, the determinations are made for a purpose similar to that of court and in proceedings similar to judicial proceedings. *E.g., Magnolia Petroleum Co. v. Hunt,* 320 U.S. 430 (1943); *United States v. Utah Construction Co.,* 384 U.S. 394 (1966); *United States v. William Tablet Co.,* 141 F.2d 141 (7th Cir. 1944). This principal of collateral estoppel has been held applicable even though the aggrieved party fails to appeal the administrative decision. *Paramount Transport System v. Chauffeurs, Teamsters and Helpers, Local 150, et al,* 436 F.2d 1064 (9th Cir. 1971). For the purpose of the rule of collateral estoppel or res judicata, "parties" barred under the rule are not merely those who are named as such in the record and properly served with process, but includes persons who have a direct interest in the subject matter of the action and have a right to control the proceedings, defend, examine witnesses, and appeal if an appeal lies. *E.g., Vane v. Haffberger Co.,* 196 Md. 450, 77 A.2d 152 (1950).

It is submitted that under the above principles the United States is estopped from asserting in this case reserved rights claims determined in the prior state administrative preceeding. Prior to the administrative hearing, the United States filed written protests on the basis that the pumping of the wells would adversely affect the water in Devil's Hole and thus result in harm to the fish living in the pool. This objection was reiterated in detail at the hearing before the State Engineer. President Truman's proclamation and expert testimony on the hydrology of the Ash Meadow area were introduced by the government. The nature, value and extent of the competing interests of

the federal government and adjacent land owners was thoroughly argued during the hearing. As the transcript reveals, the issue of the lowering of the water in Devil's Hole and the effect on the fish therein was thoroughly considered. Although the federal government did not specifically assert an implied reserved water right, the existence of a federal water right was considered, but it was concluded that one did not exist. After the State Engineer rendered his decision granting the applications, all parties were informed that they had thirty days in which to appeal. The United States did not appeal. Approximately six months later the government filed its complaint in this case in the Federal District Court. Allowing the government to thus initiate a judicial action six months subsequent to the administrative determination and after substantial investment by the individual defendant in reliance upon the administrative decision is to clearly violate the principles of collateral estoppel and to make meaningless the administrative order of the State Engineer.

From the earliest times, water law has been state law. The states have systems of water law and procedures adapted to water supply, climate, and demand. The United States does not. The initial forum, therefore, to achieve coordination and accommodation of federal uses with state and private uses is properly the state court, or in the case of Neveda, the administrative adjudication procedure which substitutes in the first instance in place of a court the State Engineer, expert in the area of water use, and from whose order an aggrieved party may appeal to the state courts. The opinion of this court in *Eagle County* case, *supra* supports this position. Furthermore, this Court there set forth the proper method by which the federal

government could obtain review of the state determinations as to its reserved rights claims:

> "*All such questions,* including the volume and scope of a particular reserved right, are federal questions, which, *if preserved,* can be reviewed here after *final* judgment by a Colorado Court." (emphasis added).

It is submitted that the proper remedy of the United States in this case was to appeal the decision rendered in the administrative proceeding to determine the individual defendant's water right application. Holding otherwise, as did the Ninth Circuit, allows the government to have a second independent review of its reserved rights claims in disregard of prior determinations under state laws and procedures. Such a decision can only exacerbate the uncertainties to which the reservation doctrine already subjects state created water rights in the West.

IV.

CONCLUSION

Despite government contentions to the contrary, it should be pointed out in conclusion that this case does not involve the survival of the Devil's Hole pupfish. As pointed out by a leading authority on the reservation doctrine:

> ". . . [T]he reservation doctrine adds nothing to the power of the United States to take and use the water it needs for any constitutional purpose or power. If a constitutionally enacted statute gives an agency of the United States the power to perform a federal function on any federal land in any state, whether public land, reservation or acquired land, and that function requires the use of water or acquisiton of a water right. No theory of federal ownership or reservation is required. The only difference resulting from reliance on the reservation doctrine instead of on a more basic federal power is that in some cases where the water is

> taken from persons who have previously put it to use the United States need not pay for the taking. The reservation doctrine is a financial doctrine and nothing more." F. J. Trelease, *Federal-State Relations in Water Law* 147 M. (1971)

Thus, if the United States determined that the condemnation of the defendant's water rights was necessary in order to preserve the Devil's Hole pupfish, it would have ample power to do so under the Endangered Species Act which empowers the Secretary of the Interior in carrying out the program "to acquire by purchase, donation or otherwise, lands, waters or interests there . . ." 16 U.S.C. Section 1534. Nevada law could not block or limit that acquisition. No reliance on the reservation doctrine would be required. Instead, the government chose to rely on reserved rights claims in the hope that it could avoid paying compensation for the destruction of the defendant's water rights.

If the Ninth Circuit decision is allowed to stand, it will mean that the federal government has succeeded in asserting reserved rights on national monumental lands for a purpose which was not intended by Congress in the legislation providing for such withdrawals, and indeed, which Congress has declared shall not entail reserved rights claims exempt from state water laws. Furthermore, the Ninth Circuit's decision will be authority for the proposition that the reservation doctrine applies to percolating ground waters. If the decision is allowed to stand, virtually all underground water in Arizona will be subject to reservation. State granted water rights will be worthless and Arizona as we know it today will not survive. The uncertainties and limitations placed on the use of water by *Cappaert v. United States* deserve consideration by this court, as its impact upon the state of Arizona and other states is immeasurable.

Finally, the Ninth Circuit's decision will mean that the federal government, contrary to the guidelines set down by this court in the *Eagle County* case, was able to obtain a second independent review of its reserved rights claims in disregard of the determinations of an earlier state administrative proceeding in which it participated and from which it failed to appeal. In view of these implications with respect to state water laws and water rights the Amicus urges this Court to review the Ninth Circuit's decision in this case.

Respectfully submitted,

STATE OF ARIZONA
BRUCE BABBIT
Attorney General
Capitol Building
Phoenix, Arizona

ARIZONA WATER COMMISSION
RALPH E. HUNSAKER
Chief Counsel
3003 North Central Avenue
1800 First Federal Savings
Bldg.
Phoenix, Arizona 85012

(Exhibits Follow)

Exhibit 1

In recent years the average annual water withdrawals in Arizona have been about 7.8 million acre-feet per year, including Colorado River uses. This withdrawal includes a groundwater pumpage of about 4.9 million acre-feet per year, local surface water diversions of about 1.3 million acre-feet per year and diversions from the Colorado River of about 1.6 million acre-feet per year. The net depletion from this total withdrawal is approximately 5.0 million acre-feet per year. (Net depletion refers to the total consumptive uses of water plus other irrecoverable uses and losses.)

The difference between withdrawal and depletion of 2.8 million acre-feet is the non consumed portion of the withdrawal and is the net return flow and/or recharge to the system. From the hydrology of the river basins we can say that along the Lower Colorado River the nonconsumptive withdrawal includes both returns to and recharge along the Colorado River in Arizona, and in the remainder of the state, it is entirely recharge to the groundwater aquifers, and further, that most of the remaining recharge occurs in central Arizona. We should also note that this return flow and/or recharge occurs from both surface water and groundwater withdrawals.

The following tabulation illustrates the details of Withdrawals, Depletion (consumptive use), and Nonconsumptive Withdrawals (return flows and recharge):

Subregional Drainage Area of State	Ground Water Pumpage	Surface Water Diversion	Total
	(thousand acre-feet per year)		
I Withdrawals			
a. Lower Colorado River mainstream drainage area	400	1,650	2,050
b. Little Colorado River drainage area	72	57	129
c. Gila River Drainage Area (central Arizona)	4,400	1,200	5,600
Total Arizona Supply	4,872	2,907	7,779
(rounded values)	4.9 maf	2.9 maf	7.8 maf
II Depletion*			
a. Lower Colorado River mainstream area			920
b. Little Colorado River area			90
c. Gila River Area** (central Arizona)			3,980
Total Arizona Use (depletion)			4,990
(rounded)			5.0 maf
III Nonconsumptive Withdrawals			2.8 maf
a. Lower Colorado River			1.1
b. Little Colorado River			negligible
c. Gila River			1.7

*Includes beneficial consumptive uses plus other vegetal and evaporative uses and losses, etc. (i.e., depletions from canals, laterals, and in-transit losses.)

**Upstream reservoir evaporation of 200 thousand acre-feet is not included in this use.

Groundwater overdraft refers to the excess of groundwater pumpage over recharge to the groundwater basin. In Arizona, most of the groundwater overdraft occurs in the central part of the State. As shown on the preceding tabulation, the average annual groundwater pumpage in this area is about 4.4 million acre-feet and the average annual recharge is about 1.7 million acre-feet. The difference represents the groundwater overdraft of about 2.7 million acre-feet per year.

The groundwater overdraft in the Gila River area can also be developed in another, somewhat independent manner, using average undepleted inflow data for the area. The theory is that the overdraft of groundwater is a direct function of the average undepleted water supply (the annual replenishable supply or "safe yield" from surface water diversion and groundwater pumpage) and the current depletion requirements.

Item	Million acre-feet per year
Average undepleted water supply	+1.80
Present depletion requirements*	—4.20
Present subregional outflow	—0.10
Average overdraft	2.50

*Including reservoir evaporation of about .2 million acre-feet.

This amount compares favorably with the previously developed estimate of 2.7 million acre-feet per year.

A few notes on groundwater pumpage and overdraft are now in order. The computed overdraft is based on average levels of withdrawal, depletion, and subsequent recharge; thus, changes in any of these quantities could alter the magnitude of the overdraft. The Central Arizona Project will bring in surface water supplies to replace some of the groundwater pumpage, thereby reducing the groundwater overdraft while the recharge remains essentially the same.

Finally, these groundwater estimates reflect those areas in the State that have agricultural and urban development, and do not account for the effects of additional ground-

water withdrawals in other areas of the State that have not yet experienced development. Additional studies to further evaluate the total groundwater resources in Arizona are in progress.

(Data derived from Lower Colorado Region Comprehensive Framework Study, Appendix V, Water Resources, June, 1971)

Exhibit 2

Land Ownership in Arizona

Federally owned	45%
Federal trust (Indian reservations)	27%
State	13%
Private	15%

Source: Arizona State Land Department, *55th Annual Report,* 1967 p. 27.